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Supreme Court of the United States

OCTOBER TERM, 1964

No. 483

CHARLES E. BOINEAU, JR., ET AL., APPELLANTS,

versus

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, appellees move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

QUESTIONS PRESENTED

Although appellants list eight questions presented by this appeal (Jurisdictional Statement, pp. 2-3), appellees suggest that the substance of these questions may be stated as follows:

1. Whether Section 23-357 of the South Carolina Code of Laws which requires that each elector, who chooses to vote, exercise his full franchise by voting for as many candidates of a given classification as there are offices to be filled subjects appellants, as voters, to invidious discrimination?

2. Whether the statute denies and abridges the female appellant's right to vote on account of sex?

3. Whether the statute denies appellants, as candidates for state offices, due process of law and equal protection of the laws?

STATEMENT

Although appellants have known, or reasonably should have known since March 2, 1964, the date of the Richland County Republican Convention, that there would be two Republican nominees to oppose ten Democratic nominees in the Richland County House of Representatives election, appellants, by-passing the State Courts, waited until June 27, 1964, to bring this action in the Federal District Court for the Eastern District of South Carolina, Columbia Division, to enjoin the enforcement of Section 23-357 of the South Carolina Code of Laws. The matter was argued before a three-judge Court, specially constituted pursuant to 28 U. S. C. §§ 2281 and 2284, on July 30, 1964. By its order dated August 10, 1964, the District Court dismissed appellants' complaint. Notice of Appeal was given on August 13, 1964. Not until September 11, 1964, did appellants file their Jurisdictional Statement with the United States Supreme

Court. According to Rule 16-(1) of the Revised Rules of the United States Supreme Court, appellees would have thirty days from the receipt of the Jurisdictional Statement within which to file a Motion to Affirm; however, on September 23, 1964, appellants filed with the Court a Motion to Advance Oral Argument. Such motion, in appellees' view, was most premature and presumptuous. Its effect is to limit appellees' time, as a practical matter, in filing a Motion to Affirm.

Because Richland County is entitled to ten seats in the House of Representatives of the South Carolina General Assembly, each elector, as a result of Section 23-357 of the Code, must cast a vote for ten persons in order to have his ballot counted. These persons may be the nominees of political parties, whose names would ordinarily be printed on the ballot, or they may be any ten qualified electors of Richland County, whose names may be simply written in by the voter.

Although Richland County is entitled to ten House seats, appellants Boineau and Turbeville are the only candidates that were selected by the Republican Party to seek election in November to the House of Representatives from Richland County. The Democratic Party, on the other hand, nominated ten candidates in two primaries which were held during the month of June, 1964.

The action of the 1964 Richland County Republican Convention in nominating merely two candidates for the House of Representatives contest was inconsistent with that taken regarding the four member Board of Richland County Administrators in that a full slate of four candidates was chosen to oppose an equal number of Democrats. Such action also constituted a sharp departure from the campaign strategy which was employed in the 1962 House race when ten Republicans were nominated to offer for election.

When the South Carolina General Assembly, in the exercise of its power to determine the manner in which the right to vote was to be employed, adopted a new and vastly comprehensive election law in 1950, what now comprises Section 23-357 of the South Carolina Code was included. 46 S. C. Stat., Act No. 858, § 7(13), at 2092. The requirements of Section 23-357 were not entirely novel to the majority of voters in South Carolina. Since 1928, if not before, voters in a Democratic Party Primary, until recently, the only meaningful election in South Carolina, were required to vote for a full slate of candidates in the House of Representatives and County Commissioners races. "Rules of the Democratic Party of South Carolina," adopted May 16, 1928. Three other states, Alabama, North Carolina, and Louisiana, have similar provisions relating to various elections. 1961 *Acts of Alabama*, Vol. II, Act No. 154, § 2, at 2102; GENERAL STATUTES OF NORTH CAROLINA, § 163-175(6); 1950 LA. REV. STAT., § 18-351, at 939. It is almost impossible to determine the number of municipalities throughout the nation which may have a similar or like provision.

Apparently, appellants desire a "single shot" ballot so as to enable them and their political supporters to execute a maneuver which consists of casting their votes either solely for the two Republican nominees, or for two Republican nominees and a number of other candidates, which number, however, might be less than the full number required by Section 23-357. Recognizing that the statute had legitimate objectives, that it did not purposefully discriminate against appellants, and that the scheme advanced by appellants would operate to the disadvantage of other voters, the District Court dismissed the complaint.

In paragraph 4 of appellants' Motion to Advance Oral Argument, there is contained a misleading statement of fact regarding an order of the South Carolina State Board of

Voting Machine Commissioners with respect to the method of casting a vote for appellants Boineau and Turbeville. Not all votes for appellants need be written in. Only those voters who do not desire to vote for appellants and eight others whose names are on the official ballot and voting machines must write in appellants' names and those of eight other electors. Because of the nature of the voting machine and the requirements of Section 23-357, any voter who wants to vote for candidates whose names appear on the ballot and voting machines and for others not thereon must write in the names of all of the candidates for whom he votes. For example, should a voter desire to vote for two Democratic candidates and none of the other remaining ten political nominees, he would have to write in the names of the two Democrats and eight other qualified electors of Richland County. It is not just appellants, therefore, who are affected.

REASONS FOR GRANTING THE MOTION TO AFFIRM

1. As to whether Section 23-357 of the South Carolina Code of Laws, which requires that each elector who chooses to vote exercise his full franchise by voting for as many candidates of a given classification as there are offices to be filled, subjects appellants, as voters, to invidious discrimination.

Subject to the limitations of the United States Constitution, the several states have broad powers to determine the conditions under which the right of suffrage, once it is given, is to be exercised, *Lassiter v. Northampton Board of Elections*, 360 U. S. 45; *Pope v. Williams*, 193 U. S. 621. State action which affects one's vote is actionable under the Equal Protection of the Laws Clause of the Fourteenth Amendment where there is a showing that such state action subjects one to discrimination and unequal treatment, *Baker v. Carr*, 369 U. S. 186; *Snowden v. Hughes*, 321 U. S. 1; how-

ever, the equal protection clause prohibits only invidious discrimination. *Morey v. Doud*, 354 U. S. 457. A statute that is based upon reasonable classifications which operates alike upon all persons similarly situated does not violate the equal protection clause. *Watson v. Nevin*, 128 U. S. 578. Due process is similarly secured if the law applies to everyone alike, does not subject an individual to an arbitrary and unreasonable exercise of governmental powers, *Caldwell v. Texas*, 137 U. S. 697, and the means selected have a real and substantial relation to the object sought to be obtained. *Nebbia v. New York*, 291 U. S. 502.

In the Court below, there was an absence of any showing whatever that Section 23-357 of the South Carolina Code, a statute which has stood since 1950, and which is deeply rooted in the voting customs of the State's electorate, will subject appellants to purposeful discrimination. The statute applies to each elector alike in Richland County, regardless of the voter's race, sex, or party affiliation. All electors, not just the Republicans, must vote for ten persons in the House of Representatives contest, in order to have their ballots tallied. The principal object sought by Section 23-357 is to provide for the collective intent of the entire electorate; and the requirement that electors vote for as many candidates of a given classification as there are offices to be filled has a real and substantial relation to that end. Cf. *Farrell v. Hicken*, 125 Minn. 407, 147 N. W. 815, 1915B L. R. A. 401.

Appellants' complaint that the requirement that they vote for ten persons violates their constitutional right to have their ballots counted as cast is without merit. While a citizen has a right to vote free from arbitrary impairment, *Baker v. Carr*, *supra*, *U. S. v. Classic*, 313 U. S. 299, *U. S. v. Mosley*, 238 U. S. 383, *Ex Parte Yarbrough*, 110 U. S. 651, he does not have an absolute right to have his vote counted as cast. Here, appellants' votes will be counted, provided

they vote in accordance with Section 23-357 and other statutes relating to the elective process. The same rules will apply to everyone in Richland County who chooses to vote next November.

The equal protection clause guarantees that all voters shall have an opportunity to participate equally in the election of state legislators. *Reynolds v. Sims*, 377 U. S. 533. In the Richland County House of Representatives contest, there are twelve candidates who seek ten seats. Every qualified voter will have an opportunity to vote for any ten of them. Each voter, including appellants, will be permitted to vote for his favorite; but to qualify his vote, the elector must vote for nine additional persons because there are ten offices to be filled. Cf. *Alsup v. Mayhall*, 208 F. Supp. 713.*

Appellants maintain, however, that they are faced with the dilemma of either voting for candidates of whom they do not approve or not voting at all. Section 23-357 contains a write-in provision for those voters who disapprove of all or some of the candidates whose names appear on the ballot, and the task of writing in a name is in no sense an unjust discrimination. *White v. Frink*, 274 Ala. 49, 145 So. (2d) 435.

In assuming that every voter will vote either the straight Democratic ticket or for the two Republicans and eight Democrats, which are but two of several possibilities, appellants conclude that the necessary result of the requirements of Section 23-357 is to dilute and debase their votes. What is true in regard to the two Republican nominees and their supporters is equally true as to any two Democratic candidates and their supporters. Mathematics is not a respecter of party lines. If it is true, as appellants allege, that the full-slate requirement dilutes and debases their votes, such dilution can be avoided by the use of the write-in pro-

* *Alsup v. Mayhall* was overruled by *Moore v. Moore*, 229 F. Supp. 435, as to the question of congressional apportionment only.

cedure. Dilution of voting power is not inherent and unavoidable in this situation, as in *Reynolds v. Sims, supra;* and appellants' political remedies are not inadequate.

2. As to whether the Statute denies and abridges the female applicant's right to vote on account of sex.

The Nineteenth Amendment does not confer the right to vote but merely prohibits discrimination upon the basis of sex. *State v. Mittle*, 120 S. C. 526, 113 S. E. 345, cert. den., 260 U. S. 705; Cf. *Smith v. Blackwell*, 34 F. Supp. 989, aff'd, 115 F. (2d) 186. As Section 23-357 makes no reference to sex, it does not draw any distinction between male and female electors such as would bring about discrimination.

3. As to whether the Statute denies appellants, as candidates for state offices, due process of law and equal protection of the laws.

As appellants' rights, as candidates, owe their origin to the State of South Carolina, the assertion that Section 23-357 denies appellants due process does not present a substantial federal question. A right to a state political office is not a right of property or of liberty that is protected by the Due Process Clause. *Snowden v. Hughes, supra.*

In regard to appellants' contention that they are denied the equal protection of the laws as candidates, there was no substantial showing below that they will be treated any differently than the other ten political candidates involved. What applies to one, applies to all. It is not the fault of the State of South Carolina that the Richland County Republican Party chose to nominate an incomplete slate of House candidates. Should the Court conclude, however, that appellants, as candidates, will be subjected to discrimination by the enforcement of Section 23-357, such discrimination could have been avoided had the Republican Party of Rich-

land County acted responsibly. If there is any discrimination towards appellants, it is certainly not by invidious design of the statute.

CONCLUSION

We respectfully submit, therefore, that appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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